

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.1174 OF 2012
WITH
CRIMINAL APPLICATION NO.247 OF 2014
IN
CRIMINAL APPEAL NO.1174 OF 2012**

NAGRAJ @ GIDDA SINNASWAMI ARJANYA)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Vikas Singh, Appointed Advocate for the Appellant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 17th OCTOBER 2018

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 6th June 2012 passed by the learned Assistant Sessions Judge, Mumbai, in Sessions Case No.133 of

2012 by which the appellant/accused is convicted of offences punishable under Sections 363 and 376 of the Indian Penal Code. For the offence punishable under Section 363 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for 7 years apart from direction to pay fine of Rs.1,000/- and in default to undergo simple imprisonment for 3 months. For the offence punishable under Section 376 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from directing him to pay fine of Rs.5,000/- and in default, to undergo simple imprisonment for 6 months.

2 Brief facts leading to the prosecution of the appellant/accused and his trial are thus :

- (a) The victim of the crime in question/PW1 is a young girl aged about 15 years. Along with her mother PW2 Razia and her sisters, she was residing in Shanti Nagar Slum, Bainganwadi, Govandi, Mumbai. She as well as her mother used to collect and sell scrap for the purpose of earning their livelihood.

- (b) The incident in question allegedly took place from 2.00 p.m. to 8.00 p.m. of 24th October 2011. The prosecutrix/PW1 and her mother PW2 Razia were intending to shift their residence, and as such, they were packing their household articles. At about 2 p.m. of 24th October 2011, the PW1/prosecutrix demanded money from her mother PW2 Razia for making payment of water charges. Her mother PW2 Razia gave her currency note of Rs.500/- and asked her to bring change. As such, the PW1/prosecutrix left the house and went towards shop of one Anna for getting the change. At that time, the appellant/accused, who was residing in the neighbourhood, came towards her and told her to accompany him for some work. They both then went to New Bus Depot by walking. At that place, the appellant/accused stopped a auto rickshaw and asked the PW1/prosecutrix to sit in the auto rickshaw. Accordingly, she sat in the auto rickshaw along with the appellant/accused. They remained in that auto rickshaw for half an

hour and then went to a garden at Chembur. The appellant/accused, at that place, gave some water to drink to the PW1/prosecutrix. Then by walking they proceeded and traveled some distance. The PW1/prosecutrix was then made to sit near a heap of stones. There she felt giddiness. Thereafter, the appellant/accused started denuding her. He told the PW1/prosecutrix that he loved her. In this manner, the appellant/accused took down her salwar. The PW1/prosecutrix was undergoing menstrual cycle at that time. She alleged that then the appellant/accused committed rape on her. He then asked her to wear her clothes. Then, by auto rickshaw, the appellant/accused left her near her house at about 9.00 p.m. of 24th October 2011.

- (c) On return to her house, the PW1/prosecutrix told her mother that the appellant/accused committed rape on her. Her mother PW2 Razia then took her to Shivaji Nagar Police Station. From there, she was taken to Rajawadi Hospital for medical treatment.

- (d) PW5 Shivaji Auti, Assistant Police Inspector, working with Shivaji Nagar Police station visited Rajawadi Hospital immediately and recorded statement of the PW1/prosecutrix. That is how Crime No.278 of 2011 for offences punishable under Sections 376 and 363 of the Indian Penal Code came to be registered against the appellant/accused at about 3.30 a.m. of 25th October 2011.
- (e) The appellant/accused was then arrested and his clothes were seized. The spot of the incident was inspected and Spot panchnama came to be prepared in presence of PW4 Bande Pathan. Birth certificate of the PW1/prosecutrix was collected. Report of her medical examination came to be collected. On completion of routine investigation, the appellant/accused was charge-sheeted.
- (f) Charge for offences punishable under Sections 363 and 376 of the Indian Penal Code was framed against the appellant/accused. He pleaded not guilty and claimed trial.

In support of the Charge, the prosecution has examined in all seven witnesses. The prosecutrix came to be examined as PW1. The First Information Report (FIR) lodged by her is at Exhibit 9. Her mother Razia is examined as PW2. Dr.Sachin Kolhe, who examined the prosecutrix at Rajawadi Hospital is examined as PW3. Exhibit 16 are the documents of medical examination of the prosecutrix. Panch witness Bande Pathan is examined as PW4. Exhibit 27 is the Spot panchnama. Shivaji Auti, Assistant Police Inspector, Police Station Shivaji Nagar, Mumbai, is examined as PW5. He had recorded the FIR of the prosecutrix. Investigating Officer Pradeep Vani, Assistant Police Inspector, is examined as PW6. Dr.Vinita Jadhav, Sub-Registrar, appointed under provisions of Registration of Births and Deaths Act, is examined as PW7. She proved certified copy of Birth Register Exhibit 35A as well as Birth certificate Exhibit 12 issued under the Registration of Births and Deaths Act showing the date of birth of the PW1/prosecutrix as 21st

September 1996. Defence of the appellant/accused was that of total denial.

(g) After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused of offences punishable under Sections 363 and 376 of the Indian Penal Code. He is accordingly sentenced as indicated in the opening paragraph of this judgment.

3 I have heard Shri Vikas Singh, the learned counsel appointed to represent the appellant/accused at the costs of the State. By taking me through the entire record he argued that the entire evidence of the prosecution is full of inconsistencies and discrepancies. It is totally improbable. The driver of the auto rickshaw, who allegedly took the PW1/prosecutrix, is not examined. The incident allegedly took place in thickly populated residential area of Mumbai, in broad daylight. There is no evidence that the PW1/prosecutrix accompanied the

appellant/accused. There is no evidence, so far as the offence punishable under Section 376 of the Indian Penal Code is concerned. Even the so called missing complaint lodged by PW2 Razia is not placed on record by the prosecution. Therefore, the appellant/accused is entitled for benefit of doubt.

4 As against this, the learned APP supported the impugned judgment and order of conviction and the resultant sentence by contending that evidence adduced by the prosecution is cogent, consistent and trustworthy. Evidence of the PW1/prosecutrix is corroborated by other evidence on record adduced by the prosecution.

5 It is clear from the case of the prosecution projected through the FIR lodged by the PW1/prosecutrix that when she was going to the shop of Anna for getting change of Rs.500/-, the appellant/accused met her on the way and asked her to accompany him for some work. That is how, she accompanied him and the couple then traveled some distance by walking and

thereafter they hired a auto rickshaw. After remaining in that auto rickshaw for about half an hour, as per the version of the prosecutrix in the FIR, the appellant/accused made her to alight the auto rickshaw near a garden at Chembur. They sat in the garden. She drank the water offered by the appellant/accused. They then traveled some distance by walk and then sat near the heap of stones where the incident of commission of rape on her took place.

6 While in the witness box, the PW1/prosecutrix deposed that when she was going towards the shop of Anna for obtaining the change, the appellant/accused directed her to sit in the auto rickshaw and took her towards the "Gym garden". Outside that garden he gave her water to drink and then she felt giddy. She further deposed that she was then taken towards the heap of stones where the appellant/accused removed her salwar, removed his pant and committed rape on her. This act, as per version of the PW1/prosecutrix, continued for 10 to 15 minutes. They were on the spot of the incident for about half an hour.

Then, they were in the garden up to 8.00 p.m. Thereafter, the appellant/accused reached her to her house at about 8.00 p.m.

7 The PW1/prosecutrix and the appellant/accused were residents of the same locality. Evidence of the PW1/prosecutrix shows that she was well acquainted with the appellant/accused. This fact is also reflected from the FIR Exhibit 9 lodged by her. Evidence of the PW1/prosecutrix goes to show that she accompanied the appellant/accused after leaving her house for getting change of Rs.500/-. She accompanied the appellant/accused by a auto rickshaw to the place of the incident. Though the PW1/prosecutrix is claiming to have suffered giddiness because of drinking water given by the appellant/accused, this version of the prosecutrix is not at all trustworthy and reliable. Soon after lodging the FIR on the day of the incident, sample of blood and urine of the PW1/prosecutrix was collected and it was sent to the forensic laboratory in order to ascertain whether she was administered some stupefying substance or drug. The Chemical Analyzer's report at Exhibit 24 makes it clear that

neither blood nor urine of the PW1/prosecutrix was showing presence of narcotic drugs like heroin, morphine, methaqualone, cocaine or psychotropic substances such as alprazolam, orazepam, diazepam, nitrazepam. It was not containing any cannabis constituents, as seen from the report of the Chemical Analyzer. Thus, theory of the PW1/prosecutrix that after she suffered giddiness due to consumption of some stupefying substance through water, the appellant/accused had committed rape on her cannot be believed. However, there is no reason to disbelieve her version that the appellant/accused had committed sexual intercourse with her at the secluded place where she was taken.

8 Spot panchnama is at Exhibit 27. The spot of the incident was shown by the PW1/prosecutrix. PW4 Bande Pathan had proved this spot panchnama. The spot of the incident, as seen from the Spot panchnama Exhibit 27, appears to be a secluded place. It was besides Chheda Nagar gymkhana. The Spot panchnama reflects that it was an open plot of land. On southern side of the spot of the incident, there was A Wing of Mandvi

Apartment. On northern side of the spot, Chheda Nagar gymkhana was situated. On east and west side of the spot of the incident, there were roads. The Spot panchnama does not show that the spot of the incident was frequented by locals. Nothing is elicited from cross-examination of PW4 Bande Pathan to show that the spot of the incident was visible to the people at large.

9 The PW1/prosecutrix was subjected to medical examination and she was examined by PW3 Dr.Sachin Kolhe of Rajawadi Hospital on 24th October 2011. The PW1/prosecutrix has stated history of her forceful kidnapping and administration of liquid to her, while narrating the history to this Medical Officer. However, this appears to be due to instinct of self reservation by the PW1/prosecutrix. Evidence of the PW1/prosecutrix shows that she had voluntarily accompanied the appellant/accused to the place of the incident.

10 In medical examination of the PW1/prosecutrix, PW3 Dr.Sachin Kolhe had not noticed any external injuries or internal

injuries. However, he noticed openings in the hymen of the PW1/prosecutrix. Evidence of PW3 Dr.Sachin Kolhe shows that there was no sign of use of force on the PW1/prosecutrix. This also indicates that the PW1/prosecutrix was a consenting party to what had happened with her on the date of the incident i.e. on 24th October 2011. I am inclined to come to this conclusion because there is nothing in the cross-examination of the PW1/prosecutrix to disbelieve her version regarding the appellant/accused taking her to the spot of the incident and then committing sexual intercourse with her. Ignoring her theory of administration of stupefying substance, her evidence makes it clear that she was in company of the appellant/accused from 2.00 p.m. to 8.00 p.m. of 24th October 2011.

11 Thus, evidence of the PW1/prosecutrix proves the fact that the appellant/accused had committed sexual intercourse with her on 24th October 2011 near Chheda Nagar gymkhana of Mumbai. Consent on the part of the PW1/prosecutrix to this act of the appellant/accused is of no consequence, as by examining

the Sub-Registrar of Births and Deaths registration, namely, Dr.Vinita Jadhav as PW7, the prosecution has proved age of the PW1/prosecutrix. Evidence of PW7 Dr.Vinita Jadhav shows that date of birth of the PW1/prosecutrix was 21st September 1996. This witness has proved certified copy of extract of the Birth Register at Exhibit 35A. Birth certificate of the PW1/prosecutrix, issued as per provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969, as well as the Rules framed thereunder, is at Exhibit 12. It shows date of birth of the PW1/prosecutrix as 21st September 1996. The same is as per entry in the statutory Birth register. Thus, on the date of the incident i.e. on 24th October 2011, the PW1/prosecutrix was below 16 years of age. Her consent, if any, as such, is irrelevant. In this view of the matter, sexual intercourse by the appellant/accused with the PW1/prosecutrix amounts to rape. Thus, I find no infirmity in the finding of the learned trial court that the appellant/accused had kidnapped the PW1/prosecutrix and committed sexual intercourse with her.

12 So far as quantum of sentence is concerned, the learned trial court was pleased to sentence the appellant/accused for rigorous imprisonment of 10 years apart from imposition of fine and default sentence for the offence punishable under Section 376 of the Indian Penal Code. It is well settled that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was committed. The sentencing court is expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The sentence is required to be adequate, just and proportionate with the gravity and nature of the crime. At the same time, circumstances of the accused are also required to be kept in mind while imposing the sentence, as one of the objects of the criminal justice system is to rehabilitate the transgressors and the criminals.

13 Prior to substitution by the Criminal Law (Amendment) Act, 2013, the offence of rape was punishable with

imprisonment of either description for a term which shall not be less than 7 years but which may be for life or a term which may extend to 10 years apart from fine. Sub-section (2) of Section 376 of the Indian Penal Code, however, was prescribing the punishment of rigorous imprisonment for a term which shall not be less than 10 years but which may be for life, apart from imposition of fine. The case in hand is not falling in sub-section (2) of Section 376 of the Indian Penal Code, as it stood prior to amendment in the year 2013.

14 In the matter of State of Himachal Pradesh vs. Mange Ram¹ the evidence on record was showing that the prosecutrix was below 16 years of age. It is held thus in paragraph 16 by the Honourable Apex Court while sentencing the accused in that case :

“16 In view of the foregoing conclusions, we reverse the findings of the learned Sessions Judge which was confirmed by learned Single Judge and find that the accused is guilty of the offence punishable under Section 376 I.P.C. As regards the

1 2000 CRI.L.J. 4027

sentence, we take a lenient view for the reason that the prosecutrix and accused are related. They were both teenagers with an age difference of about 2-3 years. Both were immature and young. Evidence indicates no marks of violence at all on any part of the body of the prosecutrix. The incident happened in 1993. After the acquittal by passage of time, the members of the two families must have buried their hatchet if any arisen on account of this incident. The learned Counsel for the respondent argued that a further order for custodial sentence at this distance of time may cause rapture to social harmony in the village life and may only help to rekindle the flames of anger which have been smouldering for so long between near relatives. Having regard to all these matters, we hold that sentence already undergone by the accused would be sufficient to meet the ends of justice, and we do accordingly."

15 In the matter of **Zindar Ali SK vs. State of West Bengal and Another**² there was no love affair between the prosecutrix and the accused but the accused was after the prosecutrix requesting her to marry him and ultimately committed

2 2009 CRI.L.J. 1324

forcible sexual intercourse with the prosecutrix. While dealing with quantum of sentence, following are the observations of the Honourable Apex Court in paragraph 15 of the judgment :

“15 This takes us to the last argument about the quantum of sentence. The Courts below have awarded 10 years of imprisonment and a fine of Rs.5,000. In our opinion, considering the fact that the incident took place about 6 years back and the fact that the accused is behind the bars for last about 5 years, as also poverty on the part of the accused, we feel that the sentence already suffered would be sufficient. The sentence of fine is however, confirmed. Fine, if recovered shall be paid to the Prosecutrix. She shall be intimated by sending notice to her. We, accordingly, modify the sentence. The appeal is disposed of with this modification.”

16 In the matter of **Phul Singh vs. State of Haryana**³, the accused was aged about 22 years and was not a habitual offender. He was found guilty of the offence punishable under Section 376 of the Indian Penal Code. While dealing with quantum of sentence, following are the observations of the Honourable Apex

3 1980 CRI.L.J. 8

Court found in paragraphs 7 and 8 of the judgment :

“7 He is a youth barely 22 with no criminal antecedents save this offence. He has a young wife and a farm to look after. Given correctional courses through meditational therapy and other measures, his erotic aberration may wither away. A man like the appellant has a reasonable prospect of shaping into a balanced person, given propitious social environs, curative and congenial work and techniques of internal stress release or of reformatory self expression.”

“8 In this background, we regard a four year term of rigorous imprisonment more hardening than habilitative, even though we deplore the sex violence the young appellant has inflicted on his cousin's wife snatching a tricky opportunity. Even so, the incriminating company of lifers and others for long may be counter-productive, and in this perspective, we blend deterrence with correction and reduce the sentence to rigorous imprisonment for two years. We wish to emphasise that the special circumstances of this case constrain us to relent a little on principle because the restorative approach

to sentencing has been jettisoned by the courts below.”

17 Lastly, in the matter of **State of Rajasthan vs. N.K. (Accused)**⁴ the Honourable Apex Court has observed thus while deciding the quantum of sentence for the offence punishable under Section 376 of the Indian Penal Code.

“19 Now remains the question of sentence. The incident is of the year 1993. The accused was taken into custody by the police on 3.11.1993. He was not allowed bail. During the trial as also during the hearing of the appeal by the High Court he remained in jail. It is only on 11.10.1995 when the High Court acquitted him of the charge that he was released from jail. Thus he had remained in jail for a little less than two years. Taking into consideration the period of remission for which he would have been entitled and the time which has elapsed from the date of commission of the offence, we are of the opinion that the accused-respondent need not now be sent to jail. It would meet the end of justice if he is sentenced to undergo imprisonment for the period already undergone by him and to a fine of Rs.2000/-

4 2000 CRI.L.J.2205

with further simple imprisonment of one year and nine months in default of payment of fine as passed by the Trial Court. The appellant is allowed time till 1st May, 2000 for payment of fine. The accused-respondent is on bail. The bail bonds shall stand discharged on payment of fine as directed. Ordered accordingly.”

18 In the case in hand, because of penury the appellant/accused was required to be provided with legal aid to prosecute his appeal before this court. The offence took place in October 2011. At the relevant time, the sentence procedure for the offence punishable under Section 376 of the Indian Penal Code was ranging from 7 years to imprisonment for life. In the case in hand, the appellant/accused, at the time of commission of offence was barely 22 years old, as seen from the charge-sheet itself. Considering age of the appellant/accused and the fact that the appellant/accused had no criminal antecedents, sentence imposed on him by the learned trial court appears to be too harsh. It needs to be scaled down to rigorous imprisonment for 7 years for the offence punishable under Section 376 of the Indian Penal

Code. So far as the sentence of imprisonment as well as fine imposed for the offence punishable under Section 363 of the Indian Penal Code is concerned, the same is maintained. In the result, the following order :

ORDER

- i) The Appeal is partly allowed.
- ii) Conviction and resultant sentence of the appellant/accused for the offence punishable under Section 363 of the Indian Penal Code is maintained.
- iii) Conviction of the appellant/accused for the offence punishable under Section 376 of the Indian Penal Code is maintained. However, his sentence on this count is modified, and for this offence, he is directed to undergo rigorous imprisonment for 7 years and to pay fine of Rs.5,000/- and in default, to undergo further simple imprisonment for 6 months.

- iv) The appeal is accordingly disposed off.
- v) In view of disposal of the appeal, Criminal Application No.247 of 2014 stands disposed off.

(A. M. BADAR, J.)